CHAPTER 3

When the State Kills in Secret

Abstract The secrecy that surrounds executions in Japan is taken to extremes seldom seen in other nations. To describe the reality of hanging in Japan (its sole method of execution since 1882), this chapter discusses two sources of evidence. First it summarizes recently discovered documents from the American Occupation of Japan (1945–1952), which reveal facts about hanging that have long been obscured by the country’s secrecy policy. Then it describes a capital trial that occurred in Osaka in 2011, where the defense directly challenged the constitutionality of hanging for the first time since Japan’s Supreme Court declared this method “constitutional” in 1955. These sources of information raise a question about execution that is hard to answer in the affirmative: Is it possible to hang a human being humanely?

Keywords Execution • Hanging • Secrecy • Silence • Occupation of Japan • Trial of Takami Sunao

In Japan and many other countries, executions used to be staged in public so that rulers could communicate to their subjects the political and cosmic forces at work when doing justice. Today, by contrast, executions are often represented as nonevents in which power is made

minimally visible.¹ In most nations that continue to carry out executions, officials try to do so silently and invisibly, though there are large differences in the degree to which this aim is achieved. In Japan, the secrecy and silence that surround capital punishment are taken to extremes not seen in other nations.² The secrecy “gap” between Japan and the United States has narrowed in recent years, as American death penalty states have become increasingly clandestine in response to concerns about their lethal injection protocols and practices, but in many respects Japan remains an outlier with respect to openness.³ Consider the following features of capital punishment in Japan—the state that kills in secret.

- Inmates on death row are not notified of the date or time of execution until an hour or two before it occurs, and some may be given no notice at all. One former prison official has said that certain condemned inmates are extracted from their cells on the ruse that they are “wanted in the office.”⁴ This sudden “your-time-has-come” policy has been called a “surprise attack” (*damashi-uchi*). Many death row inmates live for years or decades in high anxiety, wondering whether the present day will be their last. Menda Sakae, who was exonerated and released in 1983 after spending 34 years on death row, had this to say about Japan’s prior notification policy: “Between 8:00 and 8:30 in the morning was the most critical time, because that was generally when prisoners were notified of their execution... You begin to feel the most terrible anxiety, because you don’t know if they are going to stop in front of your cell. It is impossible to express how awful a feeling this was. I would have shivers down my spine. It was absolutely unbearable.”⁵

¹David Garland, *Peculiar Institution: America’s Death Penalty in an Age of Abolition* (The Belknap Press of Harvard University Press, 2010), p. 52.

²David T. Johnson, “The Death Penalty in Japan: Secrecy, Silence, and Salience”, in Austin Sarat and Christian Boulanger, editors, *The Cultural Lives of Capital Punishment: Comparative Perspectives* (Stanford University Press, 2005), pp. 251–273.

³Robin Konrad, “Behind the Curtain: Secrecy and the Death Penalty in the United States” (Death Penalty Information Center, 2018), pp. 1–85, at <https://files.deathpenalty-info.org/documents/pdf/SecrecyReport-2.fl560295685.pdf>.

⁴Sakamoto Toshio, *Shikei wa Ika ni Shikko Sareru ka* (Nihon Bungeisha, 2003), p. 69.

⁵Menda Sakae, *Menda Sakae Gokuchu Noto: Watakushi no Miokutta Shikeishu-tachi* (Impakuto, 2004).

- Relatives of the condemned are told of the execution after the fact—as are defense lawyers, the media, and everyone else in Japanese society except for a handful of state officials. This minimizes protest and limits debate.
- In some cases, members of the execution team are given little prior notification, partly out of concern that if told in advance they may not show up for work. Corrections guards who participate in an execution receive extra pay of 20,000 yen (\$180). Sakamoto Toshio, a former guard who witnessed hangings, has described the execution process as “unbearable.” “It’s awful,” he recalls. “The body bounces like a 70 kilogram object on a nylon rope...There is no worse job.” Guards on the execution team receive no counseling and, according to Sakamoto, are expected to “digest” the execution themselves.⁶
- No outsiders are permitted to attend hangings: no journalists, no relatives or friends of the victim or the condemned, and no members of the general public. Research in the United States has revealed that approximately 3–5 percent of all executions are botched, leading to prolonged suffering by the condemned during the execution process.⁷ The botch rate in Japan is unknown because those who would be willing to say do not know, for they are excluded from the execution scene.
- Scholars and reporters are denied access to many official death penalty documents. This discourages research and reporting about capital punishment.
- Citizens and members of the media are almost never allowed to view the gallows, even when it is not in use. In 2010, Japanese authorities did permit a few selected reporters to make one 30-minute visit to the glass-walled execution room in the Tokyo Detention Center.
- A “spiritual advisor” can attend a hanging, but condemned persons are not free to choose who it will be. Advisors are selected from a list of state-approved clergy, none of whom is openly abolitionist.

⁶Miwa Suzuki, “Cruel, Secretive and Politically Popular: Japan’s Death Penalty”, *Japan Times*, September 12, 2018.

⁷Austin Sarat, *Gruesome Spectacles: Botched Executions and America’s Death Penalty* (Stanford University Press, 2014).

Activity deemed “political” will result in removal from the list.⁸ Proscribed behavior includes actions that might cultivate hope in the condemned.

- Prosecutors in the Ministry of Justice select execution dates strategically, to minimize the possibility of protest and debate. Among other calculations, executions frequently occur when Parliament is in recess, often on a Thursday or Friday, near the end of the news week, when people are becoming preoccupied with weekend activities.
- The Ministry of Justice provides no explanation or justification for why certain death row inmates are selected for hanging while others are permitted to continue living. After the 13 Aum executions in July 2018, 110 inmates remained under a finalized sentence of death. By law, any of them could be chosen to die at any time, leading critics to contend that the officials who make execution decisions (mostly prosecutors) are “playing god.” In most years, only a few death row inmates are chosen for execution, according to criteria that are not made public.
- Between imposition of a death sentence and execution, inmates on death row are socially extinguished through the state’s severe restrictions on meetings and correspondence. The stated reason for this policy is to promote “stable feelings” (*shinjo no ante*) in inmates and thereby help them “prepare for death.” But one function of killing socially before killing physically is the facilitation of “smooth” executions in which demoralized inmates do not resist.⁹

In recent years the administration of executions in Japan has taken a few steps toward transparency. The Ministry of Justice, which legally and practically decides who among Japan’s inmates with a finalized sentence of death will be executed (and when), now makes a brief post-execution announcement stating the name of the person executed and describing the crimes for which he or she was hanged (until 1999, the government made no announcement at all). And as described

⁸Adam Lyons, *Karma and Punishment: Prison Chaplaincy in Japan* (Harvard University Asia Center Press, forthcoming).

⁹David T. Johnson, “Where the State Kills in Secret: Capital Punishment in Japan”, *Punishment & Society*, Vol. 8, No. 3 (July 2006), pp. 251–285.

in Chapter 1, in 2010, then-Minister of Justice Chiba Keiko created a study group in her Ministry to discuss Japan's death penalty policy, occasionally in sessions that were open to selected members of the public (the study group ended with a whimper of irrelevance, not a bang of reform). Minister of Justice Chiba also opened the gallows in Tokyo to a small group of journalists, one of the seven places in the country where condemned inmates are hanged. In my view, allowing a few selected reporters to view the gallows when not in use is like sitting in the Tokyo Dome when no one is playing baseball, for it reveals little about how the activity of interest is actually performed.

Despite these modest changes, the wall of silence surrounding executions in Japan remains largely intact.¹⁰ Figure 3.1 illustrates this “capital blackout” with a photograph of a document that the Ministry of Justice provided to a defense lawyer who used the Disclosure of Information Act to request information about what had transpired at several recent hangings. In other released documents, the lopsided ratio of white space to black resembles that shown here. This execution record (*shikei shikko shimatsusho*) provides the date of execution (2007), but it obscures almost everything else, including the name of the person who was hanged, the location of the hanging, the court that imposed the sentence of death, the persons who attended the hanging and their organizational affiliations, and (in the largest blacked out section) notes that may or may not have been taken about the execution process.

Japanese officials seldom explain the state's policy of secrecy as it relates to capital punishment. That, after all, would be inconsistent with the policy. But occasionally they do offer justifications. None is compelling. Sometimes officials say secrecy is in the condemned inmate's interest, but research shows that most inmates on Japan's death row want to know their execution day in advance, so that they can better prepare for death, and because it eliminates the “is today the day?” anxiety they wake up with every morning. Sometimes officials say secrecy is a Japanese tradition, but officials have consciously and strategically expanded the reach of secrecy in the postwar period. In reality, this “tradition” is a recent invention. Sometimes officials say secrecy is in the interest of the execution team, but this amounts to an admission that the state's policy

¹⁰David T. Johnson, “Japan's Secretive Death Penalty Policy: Contours, Origins, Justifications, and Meanings”, *Asian-Pacific Law & Policy Journal*, Vol. 7, No. 2 (Summer 2006), pp. 62–124.

様式第6号 (刑訴法478条, 最軽第10条)

死刑執行始末書

平成19年8月23日

検察庁 検察事務官

検察庁 検察官検事

所長 法務事務官

下記死刑執行の次第につき、所において刑事訴訟法第478条によりこの執行始末書を作り、執行立会者とともに署名押印する。

1 氏 名

2 本 籍

3 刑事施設名 所

4 上記の者に対する死刑執行の始末は、次のとおりである。

(1) 執行の日 平成19年8月23日

(2) 執行の場所 所

(3) 執行された死刑の判決

言渡し裁判所

言渡しの日

確定の日

(4) 法務大臣の執行命令 平成19年 8月21日

(5) 執行指揮 平成19年 8月21日

執行指揮者

検察庁 検察官検事

執行指揮嘱託者

検察庁 検察官検事

(6) 執行立会者

検察庁 検察官検事

検察庁 検察事務官

所長 法務事務官

(7) 執行経過

別紙記載のとおり。

(注意) 事例に応じ、不要の文字を削ること。

Fig. 3.1 Japanese Ministry of Justice execution record, 2007

別紙

執行經過

Fig. 3.1 (continued)

これは謄本である。

平成19年8月23日

検 察 庁

検 察 事 務 官

Fig. 3.1 (continued)

of secrecy serves the state's interest in seeing that executions are done as impersonally, bureaucratically, and non-controversially as possible. These are not democratic values. And sometimes officials claim the American way of execution—including the last-minute appeals and the “Forgive!” and “Kill him!” demonstrations that often occur outside prison walls—is unseemly and unattractive. It is, but claiming “the USA is worse” does not mean the Japanese way—“your time has come!”—is alright. Indeed, this Japanese justification reminds me of what my mother used to say (“don’t change the subject!”) when I excused my own bad behavior by suggesting that my brother had done something worse. It is, in a word, irrelevant.¹¹

The French philosopher Albert Camus observed that “Instead of saying that the death penalty is first of all necessary and then adding that it is better not to talk about it, it is essential to say what it really is and then say, whether, being what it is, it is to be considered as necessary.”¹²

¹¹David T. Johnson, “Where the State Kills in Secret: Capital Punishment in Japan”, *Punishment & Society*, Vol. 8, No. 3 (July 2006), pp. 264–268.

¹²Albert Camus, “Reflections on the Guillotine”, in *Resistance, Rebellion, and Death* (Vintage, 1960), p. 178.

State officials in Japan have long practiced a “better not to talk about it” strategy. The lay judge tribunals that started in 2009—3 professional judges and 6 lay persons who adjudicate guilt and determine sentence in serious criminal cases—means that ordinary citizens are now responsible for making life-and-death decisions in murder trials. As will be discussed in Chapter 5, with this responsibility there has been more public discussion about some death penalty issues. Most notably, questions about the propriety of capital punishment have received increased attention, and there has been a push for more information about the death penalty to be revealed by state officials—especially those in the Ministry of Justice who function as gatekeepers to the gallows—so that more meaningful discussions can occur about fundamental questions, such as whether the state should kill, and who, and how many.¹³ In this context, the question of *how* Japan executes has received more attention in recent years.

This rest of this chapter presents two sources of evidence to describe how the reality of hanging (Japan’s sole method of execution since 1882) is depicted and discussed. It first summarizes recently discovered documents from the American Occupation (1945–1952) that reveal realities about hanging that long have been obscured by Japan’s secrecy policy. It then describes a capital trial that occurred in Osaka in 2011, where the defense directly challenged the constitutionality of hanging for the first time since Japan’s Supreme Court declared this method “constitutional” in 1955. These sources of information raise a question for the fifteen Justices and thirty-some research clerks on Japan’s Supreme Court, and for the large majority of Japanese citizens who say they support capital punishment.¹⁴ Is it possible to execute a human being humanely?

¹³See, for example, Taguchi Masayoshi, editor, *Saibanin no Atama no Naka: 14nin no Hajimete Monogatari* (Gendai Jinbunsha, 2013); and Fukui Atsushi, editor, *Shikei to Mukiau Saibanin no Tame ni* (Gendaijinbunsha, 2011).

¹⁴In recent public opinion polls, approximately 80 percent of Japanese adults have said that the death penalty is “unavoidable.” As will be discussed in Chapter 6, the survey questions that elicit these answers are worded and framed in problematic ways. See Mai Sato, *The Death Penalty in Japan: Will the Public Tolerate Abolition?* (Springer VS, 2014).

OCCUPATION TRUTHS

States that practice capital punishment have a legitimization challenge: They need to distinguish how their killing differs from the criminal killing they aim to condemn.¹⁵ In the United States, one major legitimization strategy has been the effort to kill more “softly” and “humanely.” This approach—to give the condemned a “kinder and gentler” death—helps explain the frequent changes in execution method that America has experienced over the last century or so—from hanging to electrocution to the gas chamber to lethal injection. The American quest to kill without imposing more pain than “necessary” is not so much about sparing the condemned from suffering as it is about convincing the administrators and spectators of death that capital punishment is “civilized.”¹⁶

The Japanese state faces a similar legitimacy challenge but answers the call quite differently. There have been no significant changes in execution method in Japan since 1873, when a new gallows was introduced after an old-fashioned hanging was botched. Today, hanging remains the only method in each of Japan’s seven execution centers, and since a Supreme Court opinion in 1955 upholding the constitutionality of hanging, there has been little discussion of alternative methods of execution. The lack of debate is not because the Japanese way of hanging is humane. In Japan as in India, Pakistan, Singapore, Malaysia, Iran, and Iraq, the point of hanging is to cut or crush the spinal cord by tearing it from the brain stem. If the initial shock of the drop is not fatal, death is completed by strangulation.¹⁷

Some hangings are botched in Japan, as they are in other countries. A former prosecutor once told me that a prison official told him that following one bungled hanging, a member of the execution team finished the job with a judo hold. But the secrecy surrounding capital

¹⁵Austin Sarat, *When the State Kills: Capital Punishment and the American Condition* (Princeton University Press, 2001), p. 21.

¹⁶David Garland, *Peculiar Institution: America’s Death Penalty in an Age of Abolition* (The Belknap Press of Harvard University Press, 2010), pp. 268–272.

¹⁷Nakagawa Tomomasa Bengodan and Walter Rabl, editors, *Koshukei wa Zangyaku na Keibatsu de wa Nai no ka? Shimibun to Hoigaku ga Kataru Shinjitsu* (Gendaijinbunsha, 2011).

punishment in Japan helps explain the absence of controversy over execution methods. In effect, “killing secretly” instead of “killing softly” has been the Japanese state’s legitimation strategy. If one meaning of lethal injection in the United States is that state killing is different than ordinary murder because it is done humanely, the message conveyed in Japan has long been that state killing is state business.

The U.S. Occupation (1945–1952) bequeathed two death penalty legacies to Japan. The first is the retention of capital punishment. As explained in Chapter 1, Occupation authorities could have abolished capital punishment in Japan as they did in Germany after World War II, but they elected not to, in large part because they were determined to put “war criminals” to death in the Tokyo War Crimes Trial.¹⁸ The second Occupation legacy is a policy of “censored democracy” which has fostered a political consciousness of passive acquiescence to the silences dictated by Japan’s death penalty secrecy.¹⁹ Viewed historically, Japan’s policy of secrecy and silence is partly an American invention.

The documents discovered by Professor Nagata Kenji on microfiche in Japan’s National Diet Library contain the records of 46 persons who were hanged between July 1948 and March 1951, a period during which Japan was occupied by the American military and ruled by General Headquarters (GHQ) and General Douglas MacArthur, the Supreme Commander for the Allied Powers (SCAP).²⁰ The documents include execution planning papers (*shikei shikko kiansho*), execution reports (*shikei shikko shimatsusho*), and letters. Most of the documents were composed by prison wardens or by chiefs of the Japanese detention facilities where executions occurred. They are significant because they provide a peak behind the veil that has shrouded Japanese hangings since the policy of secrecy was established in the 1960s and 1970s. The 46 hangings are a little less than 40 percent of all the hangings that occurred during this 33-month period. They may be unrepresentative in some respects, albeit in ways one cannot know because no records have been

¹⁸Richard H. Minear, *Victors’ Justice: The Tokyo War Crimes Trial* (Charles E. Tuttle Company, 1971); and Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Harvard University Asia Center, 2009).

¹⁹John Dower, *Embracing Defeat: Japan in the Wake of World War II* (W. W. Norton, 1999), Chapter 14.

²⁰Nagata Kenji, *GHQ Bunsho ga Kataru Nihon no Shikei Shikko: Kobunsho kara Semaru Koshukei no Jittai* (Gendaijinbunsha, 2013).

discovered for the rest of the hangings carried out in this period. Still, the records that are available tell important truths about the age and social status of the condemned, their last words, and the duration of their executions.²¹

The Occupation records show that the age of the condemned at the time of execution has increased dramatically since the 1950s. In the Occupation sample, the median age at hanging was 27, with the youngest person hanged being 23 and the oldest 63. By contrast, in recent decades the median age at hanging was 56—more than double the median age in the Occupation. In the 20 years between 1993 and 2012, almost 40 percent of all persons executed were over 60 years of age. It appears Japan has one of the most geriatric death rows in the world, and there seem to be two main reasons for this graying of its gallows. First, Japan's homicide rate has dropped dramatically since the 1950s. The main proximate cause of the decline is a large decrease in the percentage of homicides committed by young men. As young killers have been vanishing, older killers have come to constitute a larger proportion of homicide offenders.²² Second, in the 1940s and 1950s, executions in Japan were usually carried out within a few months of a finalized sentence of death. Today, by contrast, a sentence of death is often the prelude to a long appeals process. The secrecy that surrounds executions means little media attention gets focused on how senior citizens are hanged. On Christmas Day in 2006, for example, the two people hanged in Tokyo were ages 75 and 77, respectively. Neither could walk to the gallows on his own, and both were in the process of appealing for retrial at the time of execution. These facts passed almost unnoticed in the perfunctory media coverage that followed their executions.

The Occupation documents also provide evidence that in Japan as in other death penalty nations, persons who get executed tend to be poor and poorly connected. Seven of the 46 persons hanged were ethnically Korean (15 percent). Since Koreans constituted only about 3 percent of Japan's total population at the end of the Pacific War, they are "overrepresented" in this execution sample by a factor of 5. In some

²¹Kenji Nagata and David T. Johnson, "Hanging in Japan: What Occupation Era Documents and a Lay Judge Trial Teach About the State That Still Kills in Secret", *Punishment & Society*, Vol. 16, No. 3 (July 2014), pp. 227–257.

²²David T. Johnson, "The Vanishing Killer: Japan's Postwar Homicide Decline", *Social Science Japan Journal*, Vol. 9, No. 1 (April 2006), pp. 73–90.

capital cases, SCAP officials wondered whether Japanese judges discriminated against Koreans in sentencing and therefore performed a special “Review of Sentences Imposed upon Koreans” after judicial appeals had been exhausted. More broadly, the Occupation records provide reason to believe there was capital bias against other have-nots, for nearly 70 percent of the persons in the Occupation records (31/46) were unemployed at the time they committed their capital offenses, and more than 30 percent (14/46) were homeless. These are far higher percentages than the percentages of people in the general population who were unemployed and/or homeless.

In the Occupation records, communications between the condemned and their family and friends varied from case to case. Eight of the 46 men in the GHQ/SCAP sample received no letters or visitors between the time their conviction was “finalized” (*kakutei*) and their execution, whereas a man who was hanged in 1950 received at least 14 visitors and 66 letters in the 11 months preceding his execution (he also sent 280 letters of his own). It appears there was substantially more freedom for death row inmates to communicate with outsiders in the 1940s and 1950s than there is today. The secrecy that surrounds executions in Japan deepened in the 1960s and 1970s in response to the rise of an abolitionist movement, out of concern that the emergence of “support groups” for inmates on death row would make administering death more difficult for corrections officials, and out of a desire to prevent suicide by inmates who had been notified that soon they would be hanged.²³

In contrast to death rows in the United States, where the culture of capital punishment finds expression in “last words,” “final meals,” and other “farewell” expressions, little is known about what the men and women on Japan’s death rows think and feel before their execution. But the Occupation documents do provide some insight into the Japanese past that can inform our musings about the present. In the Occupation, death row inmates’ “final words” took four main forms. Some inmates expressed *thanks* to officials of the correctional institutions for treating them kindly. Some left *warnings* for family members, as did a man hanged in Nagoya in 1951, who said his child should avoid gambling offenses of the kind that led to his own capital offense (robbery-murder). Some offenders left *haiku* or *tanka* poems of the kind

²³David T. Johnson, “Where the State Kills in Secret: Capital Punishment in Japan”, *Punishment & Society*, Vol. 8, No. 3 (July 2006), pp. 261–264.

that have been composed by criminal offenders in Japan since the feudal period. A 33-year-old man hanged in Osaka in 1951 left the following forlorn poem:

The spring wind
Blew through the tree sprouts
But did not blow to this place

The last form of “final words” was the most common. In the Occupation records, 43 of the 46 persons (93 percent) expressed *regret* for their crimes. Regret, remorse, and apology have long been central values in Japanese culture and in Japan’s criminal court communities, but the extent of their presence in these Occupation documents is striking. The final words of the condemned were recorded by prison officials who may have omitted messages (“I am innocent”) they did not like and who may have highlighted messages (“Thank you, and I am sorry”) that were welcome, but the bias of the recorders probably cannot fully explain the widespread presence of regret in the final words of the condemned.²⁴

Finally, the Occupation records enable us to make several observations about time and executions. For one thing, executions during the Occupation were less concentrated in time than they have been in recent years. In 1950, for example, hangings occurred on at least 21 different days during the year, resulting in a total of 31 executions. By comparison, in 2008, when Japan executed 15 persons—the largest number of executions the country had carried out since 1975—all of the hangings occurred on only five days. Moreover, 27 of the 46 persons in the Occupation records (almost 60 percent) were executed alone on the day of their demise. In recent years, executions in Japan have almost always involved two or more persons who get hanged on the same day—often at the same gallows. The increased “lumpiness” of executions appears to be designed to minimize the number of occasions when hangings could attract public and media attention.

Hangings in the Occupation, like hangings in subsequent decades, usually occurred in the morning. In the Occupation records, the execution start times ranged from 9:19 a.m. to 2:39 p.m., but 42 of the

²⁴Kenji Nagata and David T. Johnson, “Hanging in Japan: What Occupation Era Documents and a Lay Judge Trial Teach About the State That Still Kills in Secret”, *Punishment & Society*, Vol. 16, No. 3 (July 2014), pp. 236–240.

46 hangings occurred before noon, and the four that occurred in the afternoon all occurred in Osaka. Hangings in Japan tend to be scheduled for the morning in order to reduce stress on the execution team and minimize the possibility of leaks to the media. Members of Japanese execution teams are typically told of their job assignment the day before a hanging, they are ordered not to tell anyone about it, and they are expected not to refuse the assignment. In some cases, executioners are only told of their assignment on the morning a hanging occurs, apparently out of fear that if told in advance they might not show up for work.

The duration of hangings in the Occupation records ranged from 10 minutes and 55 seconds (in Miyagi in 1950) to 21 minutes (in Nagoya in 1951). Thus, the longest hanging was almost twice as long as the shortest. The average length of all 46 hangings, from the time of the “drop” to the time a doctor confirmed death, was 14 minutes and 15 seconds, with a median time of 14 minutes. In the United States, three criteria have been identified by courts to indicate whether an execution method provides “a death within constitutional limits”: the death must be painless, it must be non-lingering, and it must be instantaneous. Conversely, a death that is painful, lingering, or not instantaneous raises questions about “cruel and unusual punishment” under the Eighth Amendment to the U.S. Constitution. It is difficult to discern whether Occupation executions were problematic in these ways, for the records are not exhaustive accounts of what transpired during executions, and they were written by state officials who may not have recorded certain problematic events. Some doctors may also have allowed inmates to hang for several minutes after all signs of life had disappeared before declaring the person dead. Still, the Occupation evidence is troubling, for all of the Japanese hangings exceed by at least a factor of five the “two minutes or less” American standard for a “non-lingering” death that has been used to assess executions, and the Japanese average is more than seven times longer than this American threshold.

Japan’s method of hanging has changed little since the Meiji period, so there is little reason to believe that execution lengths have become significantly shorter in the two-thirds of a century since the Occupation ended. If hangings in Japan are like executions in jurisdictions where state killings are more transparent, then some surely have been “botched” because of problems with the length or placement of the rope, or with the depth of the drop, or with the physiology of the condemned (among other possibilities). Research in the United States

finds that botched executions take place with regular frequency. If we assume that hangings in Japan have been carried out no more and no less smoothly than executions in America (where research reveals a “botch rate” of 2.7–4.5 percent), then 19–32 of the 713 persons hanged between January 1946 and July 2017 would have had their executions botched. That would be, on the average, one botched hanging every two or three years. If capital punishment in Japan is “normal” in this respect, then the issue of hanging could be litigated under Article 36 of the Constitution, which declares that “cruel punishments are absolutely forbidden.”²⁵ The next section examines the only significant effort in recent years to challenge the constitutionality of hanging in Japan.

HANGING ON TRIAL

On July 5, 2009, 41-year-old Takami Sunao set light to a bucket of gasoline he had poured on the floor of a pachinko parlor in the city of Osaka. The subsequent blaze killed five people and injured 10 more. By Takami’s own account, his attack was motivated by anger over his life circumstances, including employment difficulties and financial debt, and by the desire to exact revenge on a woman he referred to as “Mihi,” who had been making his life miserable—and who did not exist. Despite his delusions, Takami admitted that his mass murder was premeditated. Moreover, before, during, and after his trial, he frequently said that he would like to die and that he would accept a sentence of death.

In Japanese criminal justice, premeditated murder that leads to the loss of more than two lives usually results in a death sentence—and so it did in Takami’s case when the Osaka District Court condemned him to death on October 31, 2011. But unlike many criminal trials in Japan, this one was more than a rubber stamp ratifying the outcome prosecutors sought. Takami’s trial lasted 60 days, making it the longest lay judge trial in the country up until that point. Two main issues were contested at his trial. First, the defense team argued that Takami lacked criminal responsibility (*sekinin noryoku*) because he was schizophrenic, while prosecutors argued (and the court ultimately concluded) that the defendant was mentally competent at the time of the crimes even though

²⁵Kenji Nagata and David T. Johnson, “Hanging in Japan: What Occupation Era Documents and a Lay Judge Trial Teach About the State That Still Kills in Secret”, *Punishment & Society*, Vol. 16, No. 3 (July 2014), pp. 240–242.

he was delusional due to his frequent use of methamphetamines. Second, the defense argued that hanging violates the prohibition against “cruel punishments” in Article 36 of Japan’s Constitution. The court ultimately rejected this argument too, but it did so in language that recognized some of the realities of hanging that have been hidden from the Japanese public for decades.

Defense lawyers in this case wondered about the wisdom of challenging hanging because they knew that if the court rejected their claims, the effect might be to bolster the legitimacy of capital punishment. In the United States, efforts to “humanize” methods of execution have entrenched the death penalty, making what remains of this institution more resistant to repeal.²⁶ But in a case that seemed like an evidentiary slam dunk for the prosecution (in addition to Takami’s confession, there was surveillance video of him starting the fire), defense lawyers believed that challenging hanging was one of the few ways his life might be saved. They also felt dismayed over how thoroughly Japanese defense attorneys had acquiesced to the legality of capital punishment over the past half-century.

The jurisprudence of capital punishment in Japan is easily summarized because there is little of it. In 1948, the Supreme Court held that capital punishment is not necessarily a “cruel punishment” even though some methods of execution are, such as burning at the stake or boiling in a cauldron—methods that had been used in Japan before the Meiji oligarchs encountered Western sensibilities about criminal punishment in the last third of the nineteenth century and reformed them in order to appear more “civilized” to the outside world. The same decision declared that a method of execution such as hanging that is deemed “constitutional” at present could become a “cruel punishment” under Article 36 if social circumstances and human morality changed. In 1955, the Supreme Court reaffirmed this position when it found that, compared with other methods of execution then being used in the world (strangulation, beheading, shooting, the electric chair, and the gas chamber), hanging is not an especially “cruel punishment” under Article 36.²⁷

²⁶Hugo Adam Bedau, “An Abolitionist’s Survey of the Death Penalty in America Today”, in Hugo Adam Bedau and Paul Cassell, editors, *Debating the Death Penalty: Should America Have Capital Punishment? The Experts from Both Sides Make Their Case* (Oxford University Press, 2004), pp. 15–50.

²⁷Petra Schmidt, *Capital Punishment in Japan* (Brill, 2002), pp. 90–100.

Between this opinion in 1955 and Takami's arson attack in 2009—more than half a century—the constitutionality of hanging was never litigated in Japan.²⁸ The presence of lay judges at Takami's trial created a new opportunity to challenge the legal legitimacy of a method that has disappeared in the United States.²⁹

Takami's defense team persuaded the Chief Judge in Osaka to ask the Ministry of Justice for information about whether persons who had been hanged in the past were injured in the process, but the Ministry refused the request with an empty bureaucratic formula: "*kaito itashikanemasu*" ("we are unable to reply to your request"). An Austrian scientist named Walter Rabl did testify at trial about the research he had done following the autopsies of approximately 300 persons who had committed suicide by hanging. Rabl, the President of the Austrian Society of Forensic Medicine, agreed to testify because he "was shocked that in a modern civilized country like Japan judicial hanging...is accepted as a 'non-cruel' method of execution" and because "there are so many misunderstandings and factual errors concerning death caused by judicial hanging." Rabl said that "any method of execution is cruel and incompatible with the Hippocratic oath," and he concluded that "judicial hanging is especially cruel in two respects": because the consciousness of a hanged person lasts at least 5–8 seconds and sometimes as long as 2–3 minutes, with severe injury and pain the norm; and because the result of judicial hanging for any individual is not predictable. Botched hangings, including decapitation, which Rabl observed in 2 percent of the corpses he examined, can occur even when an execution is carried out "according to standards."³⁰

Former prosecutor Tsuchimoto Takeshi also testified for the defense in Takami's trial. He had worked as a prosecutor for 30 years before

²⁸Nakagawa Tomomasa Bengodan and Walter Rabl, editors, *Koshukei wa Zangyaku na Keibatsu de wa Nai no ka? Shimbun to Hoigaku ga Kataru Shinjitsu* (Gendaijinbunsha, 2011).

²⁹Until recently, hanging was authorized in the United States in Delaware, New Hampshire, and Washington, but the state Supreme Courts in Delaware (2016) and Washington (2018) have declared their capital sentencing procedures unconstitutional and resentenced all death-row prisoners to life without parole, while New Hampshire's legislature abolished that state's death penalty in 2019. Hanging is not authorized in the U.S. federal and military death penalty systems.

³⁰Kenji Nagata and David T. Johnson, "Hanging in Japan: What Occupation Era Documents and a Lay Judge Trial Teach About the State That Still Kills in Secret", *Punishment & Society*, Vol. 16, No. 3 (July 2014), pp. 242–247.

becoming a professor at Tsukuba University. After resigning from the procuracy, his conservative positions on crime control and criminal justice were frequently quoted in the media. But six months before Takami's trial, a book was published about Tsuchimoto's prosecution of a man who had committed murder in 1966 and who was executed in 1971 despite Tsuchimoto's requests that he be granted clemency.³¹ Tsuchimoto did not believe the offender was actually innocent, but he had exchanged letters with the inmate while the latter was on death row, and he had come to believe in the possibility of the inmate's redemption and atonement. When Tsuchimoto spoke with Takami's defense lawyers before he testified at Takami's trial, the former prosecutor expressed ambivalence about appearing as an expert witness. He had serious concerns about the propriety of hanging as an execution method, but he also supported capital punishment in principle and feared that he would be seen as betraying his friends and former colleagues in the procuracy if he testified for the defense. As he anticipated, when Tsuchimoto agreed to testify following persistent requests from the defense, prosecutors claimed he was violating the obligation of secrecy under Japan's National Public Service Law. In the end, however, Tsuchimoto was permitted to testify, and this was his main message:

The death penalty itself is not unconstitutional, but death by hanging violates Article 36 of the Constitution...It is a gruesome and cruel punishment that one cannot bear to look at directly...Following the sound of the footplate being removed, the rope cut into the death row inmate's neck, leaving the inmate hanging in midair. A medical officer and other officials checked for the inmate's pulse and other signs, then announced that the inmate had died...When I looked at the person, who just a few moments earlier was breathing and warm, having their hands and legs bound so they couldn't resist and then swinging [on the rope], I thought it was gruesome...[Hanging] may have been appropriate at the time [of the Supreme Court's 1955 decision], but today it would be rash to judge that it is appropriate.³²

³¹Horikawa Keiko, *Sabakareta Inochi: Shikeishu kara Todoita Tegami* (Kodansha, 2011).

³²*Mainichi Japan*, "Japan Court Deliberates Hanging's Unconstitutionality", October 11, 2011.

Several victims and survivors of Takami's crimes harshly rebuked his defense lawyers for having the temerity to challenge hanging for such a heinous offender. Ultimately, the Osaka District Court sentenced Takami to death by hanging. Three pages of its 27-page opinion addressed the method of execution, including these words:

The death penalty inevitably inflicts mental and physical pains on the inmate and involves brutality to some extent. But since the Constitution allows the death penalty to be retained, it evidently considers these pains to be unavoidable and inevitable. Therefore, an execution method constitutes 'cruel punishment', which is prohibited by Article 36 of the Constitution, only when it is especially brutal among possible execution methods... Obviously it is not required that an execution method relieve the mental and physical pains of the inmate to the utmost extent and keep them to some minimum, as if execution is a medical treatment... A method of execution should be considered a 'cruel punishment' only in the limited case when it is so impersonal and inhuman that it shocks a person with ordinary emotions. Otherwise, what kind of execution method is adopted is a matter to be decided through the discretion of the legislature.³³

The idea in the Court's opinion that came to stand for the whole is that an inmate who is hanged "naturally must endure some mental and physical suffering" (*kutsu wa tozen kanju subeki*). Yet this conception of so-called "forgivable cruelty" seems inconsistent with the absolutist language of Article 36 of the Constitution, which states that "cruel punishments are absolutely forbidden."

As for the citizens who served as lay judges at Takami's trial, two themes emerged from their comments at the post-sentencing press conference. First, the lay judges seemed resigned to the inevitability of "cruelty" in the hanging process. Humane execution may well be a practical impossibility, but this court diverged from some American jurisprudence by finding that it is not necessary to keep the mental and physical pains of an executed inmate "to some minimum." Second, the lay judges stressed that Japan needs to encourage deeper debate about its death

³³See "A Judgment of the Osaka District Court, October 31, 2011", at The Law Office of Goto Sadato, <http://sgotolaw.com/jd.html>.

penalty, so that policy and practice better reflect “citizens’ sensibilities” (*shimin kankaku*).³⁴

In 2013 the Osaka High Court rejected Takami’s appeal and upheld his death sentence and the constitutionality of hanging. It held that Takami’s own conduct was “extremely cruel,” and that “hanging cannot be called cruel because the duration of felt suffering by the condemned is brief.” The High Court also echoed the lay judges when it encouraged Japan’s Diet to promote public discussion of execution methods. It said “leaving hanging as it is for 140 years without legal change is certainly not a desirable legislative policy,” and it noted that the current method of hanging is “inconsistent in many respects” with the execution ordinance (*fukoku*) that was promulgated in 1873. Former prosecutor Tsuchimoto called the High Court’s decision “highly significant” because it exposed “the legislative branch’s negligence in failing to discuss execution methods,” but in 2016 the Supreme Court finalized Takami’s death sentence without seriously engaging the issue of hanging.³⁵ As of this writing in July 2019, Takami is still alive, but he could be hanged any day. Except for a handful of government officials, no one will know until after it occurs.

PROBLEMS AND PARADOXES

The Osaka District Court’s recognition that executions “unavoidably” involve some kind of cruelty is consistent with findings from American research which conclude that even a routine or “properly performed” execution can cause intense pain and lingering death, and which find that executions—no matter the method—are regularly botched. Japan’s jejune jurisprudence of executions seems more candid about the “inevitability” of cruelty than American courts have been, but the country

³⁴For an insightful discussion of Takami’s case, see Horikawa Keiko, “Koshukei wa Zangyaku ka”, *Sekai*, No. 825 (January 2012), pp. 63–72, and *Sekai*, No. 827 (February 2012), pp. 122–131.

³⁵Kenji Nagata and David T. Johnson, “Hanging in Japan: What Occupation Era Documents and a Lay Judge Trial Teach About the State That Still Kills in Secret”, *Punishment & Society*, Vol. 16, No. 3 (July 2014), p. 247.

cannot escape some of the problems and paradoxes that have plagued execution methods in America. This conclusion focuses on four of them.³⁶

First, there is no humane way to execute a human being. There is a large body of evidence documenting problems with capital punishment in America, from wrongful convictions and racial bias to geographic disparities and failures of deterrence. The evidence about capital punishment in Japan is more limited because the subject has been less researched, but it points to a similar conclusion, that the death penalty involves godlike actions without godlike wisdom or skills. It is impossible to construct a system of capital punishment that reaches only the rare, right cases, without also occasionally condemning the innocent or the undeserving. It is also impossible to construct a system of executions that takes the lives of heinous offenders in a manner that is humane. The United States has tried to do the latter—to realize the dream of a perfect execution—and it has failed.³⁷ Japan has hardly tried at all. One might call the Japanese approach a prudential form of “legal realism” or a wise refusal to be seduced by an “impossible dream.” But one could also call it a failure of legal aspiration that parallels the tendency of the country’s courts (described in Chapter 2) to assume that death is not a “different” form of punishment requiring special procedures and protections for the accused. In law as in life, failures of aspiration can be even more troubling than failures of performance.

Second, hanging in Japan raises a question about the difference between criminal violence and the violence that law employs to punish crime. In the United States, frequent efforts to improve execution methods are partly a search for a way of taking life that signals the superiority of state killing over the killings that citizens commit. After more than a half-century of silence about the propriety of hanging, Japan may now be starting its own search for a method of execution that tries to signal “superiority” of this kind. It remains to be seen how diligent Japan’s

³⁶Kenji Nagata and David T. Johnson, “Hanging in Japan: What Occupation Era Documents and a Lay Judge Trial Teach About the State That Still Kills in Secret”, *Punishment & Society*, Vol. 16, No. 3 (July 2014), pp. 247–249.

³⁷Timothy V. Kaufman-Osborn, “Perfect Execution: Abolitionism and the Paradox of Lethal Injection”, in Charles J. Ogletree and Austin Sarat, editors, *The Road to Abolition: The Future of Capital Punishment in the United States* (New York University Press, 2009), pp. 215–251.

search will be, but the American experience provides ample reason for pessimism about the results.³⁸ At the same time, the Occupation documents and the Osaka trial suggest that as it relates to Japan, the question about the distinctiveness of law's violence may no longer be hanging in oblivion.

Third, efforts to reform how the state kills confront death penalty opponents in Japan with the same paradox that their American counterparts face. On the one hand, if attempts to challenge hanging are abandoned, there will be gratuitous suffering by people who are executed. On the other hand, if legal challenges to hanging in Japan continue, "victory" in the form of reform of execution methods will prove pyrrhic if it means complicity in the state's effort to accomplish the sort of anesthetized death that fosters collective amnesia about the violence of capital punishment. This, anyway, is what has happened in the United States.³⁹ Japanese death penalty reformers would be wise to recognize the risk of trying to change their country's execution method. Execution reform is often a two-edged sword, and "the better" (a "softer" method of execution) can be the enemy of "the best" (abolition).

Finally, the Japanese state continues to kill in secret, so little is known about how it hangs, but what we learn from the Occupation documents and the Osaka trial is troubling. Hanging in twenty-first-century Japan is no more humane than hanging in nineteenth-century Nagoya or Nagasaki. As for the future, there is little reason to expect Japan's Supreme Court to find hanging problematic for the simple reason that it rarely finds anything constitutionally suspect. Since its creation in 1947, Japan's top court has struck down fewer than 10 statutes on constitutional grounds.⁴⁰ By comparison, Germany's constitutional court, which was established several years later, has struck down over 600. The most promising venue for challenging the propriety of hanging in Japan is the court of public opinion. In the years to come, the country's lay

³⁸Austin Sarat, *Gruesome Spectacles: Botched Executions and America's Death Penalty* (Stanford University Press, 2014).

³⁹Deborah W. Denno, "For Execution Methods Challenges, the Road to Abolition Is Paved with Paradox", in Charles J. Ogletree and Austin Sarat, editors, *The Road to Abolition: The Future of Capital Punishment in the United States* (New York University, 2009), pp. 183–214.

⁴⁰David S. Law, "The Anatomy of a Conservative Court: Judicial Review in Japan", *Texas Law Review*, Vol. 87, No. 7, pp. 1545–1594.

judge system will provide more opportunities for capital defendants and defense lawyers to raise questions about the legality and legitimacy of a method of execution that has hardly changed in a century and a half. Japanese governments have long acted as if state killing is state business, but now that citizens are participating in decisions about who to send to the gallows, they are wanting to know more about what happens *after* a sentence of death has been imposed. Surely some members of the Japanese media should be permitted to watch executions so that they can provide information for citizens to make more enlightened judgments about the reality of capital punishment. Until such reforms occur, secrecy will remain a problematic premise for administering the ultimate punishment.

Open Access This chapter is licensed under the terms of the Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International License (<http://creativecommons.org/licenses/by-nc-nd/4.0/>), which permits any noncommercial use, sharing, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license and indicate if you modified the licensed material. You do not have permission under this license to share adapted material derived from this chapter or parts of it.

The images or other third party material in this chapter are included in the chapter's Creative Commons license, unless indicated otherwise in a credit line to the material. If material is not included in the chapter's Creative Commons license and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder.